CONSENT OF THE PARTIES IN DETERMINING JURISDICTION OF FEDERAL COURTS ON REMOVAL.—The venue clause in the Removal Acts of 1887-8[1] provides that suits within the original jurisdiction of the Federal courts must be instituted in the district of the defendant's residence, except where jurisdiction rests solely upon diversity of citizenship, when suit lies either in the district of residence of the plaintiff or the defendant. This clause has been construed as conferring a personal privilege so that suit in the proper district, though essential to the jurisdiction of the person, is not a requisite of the court's general jurisdiction.[2] Accordingly, suit may be maintained in any district if this personal privilege has been waived, and the bringing of suit in a neutral district constitutes a waiver by the plaintiff. The jurisdiction of Federal courts is limited to those causes in which they would have original jurisdiction,[3] and it would seem that the parties may still avail themselves of the privilege under the venue clause.[4] Therefore, upon suit in a neutral state, although the defendant, by his petition for removal, assents to the jurisdiction of the Federal court of that district,[5] the consent of the plaintiff also seems requisite.[6] An early Federal Circuit Court took this position,[7] in opposition to the weight of contemporaneous authority,[8] and the Supreme Court has virtually sanctioned it by holding, in a similar case, that a removal had been properly granted, as the plaintiff had assented.[9] A tendency in this direction had already become manifest in the Circuit Courts.[10]

Where the suit is between citizens and aliens, however, different factors require consideration. The holding of the Supreme Court that a defendant's right of immunity from suit in any but his own district, is inapplicable in the case of a non-resident alien defendant,[11] has sometimes been cited for the proposition that in suits between aliens and citizens there is no restriction on the district in which suit may be maintained.[12] This seems unwarranted, and an alien may sue a citizen in the district of his residence

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[1]24 U. S. Stat. at L. 552; 25 U. S. Stat. at L. 433.

[2]So. Pac. Co. *v.* Denton (1892) 146 U. S. 202; Wilson *v.* Western Union Tel. Co. (1888) 34 Fed. 561, overruling Yuba *v.* Pioneer Co. (1887) 32 Fed. 183.

[3]Cochran *v.* Montgomery Co. (1905) 199 U. S. 260.

[4]Proctor Coal Co. *v.* U. S. Co. (1907) 158 Fed. 211.

[5]State *v.* Houchens (1902) 52 C. C. A. 176.

[6]Matter of Moore (1907) 209 U. S. 490; Western Loan Co. *v.* Butte Min. Co. (1907) 210 U. S. 368.

[7]Foulk *v.* Gray (1902) 120 Fed. 156.

[8]These cases arrived at an opposite conclusion on various grounds: (1) that the section of the Statute referring to removals had no application to the venue clause; First Nat'l Bank *v.* Merchants Bank (1888) 37 Fed. 657; Duncan *v.* Assoc. Press (1897) 81 Fed. 41; (2) that the right of removal is vested wholly in the defendant; Kansas City R. R. Co. *v.* Lumber Co. (1888) 37 Fed. 3; and (3) that while plaintiff's consent is necessary, he waives his right to withhold it by bringing the action in the State court, in that he voluntarily subjects himself to the process of the Removal Acts. Iowa Lilloet Co. *v.* Bliss (1906) 144 Fed. 446; Cowell *v.* City Water Supply Co. (1899) 96 Fed. 769.

[9]Matter of Moore, *supra.*

[10]Louisville R. R. Co. *v.* Fisher (1907) 155 Fed. 68; Corwin Mfg. Co. *v.* Henrici Washer Co. (1907) 151 Fed. 939; Horn *v.* Pere Marquette R. R. Co. (1907) 151 Fed. 626. The occasion for this tendency seems to have been the attempt of the Circuit Courts to reconcile a *dictum* in *Ex parte* Wisner (1906) 203 U. S. 449, to the effect that the consent of both parties was insufficient to confer jurisdiction upon a neutral Federal court, with previous Supreme Court cases such as Central Trust Co. *v.* McGeorge (1894) 151 U. S. 129, not held to have been overruled by the Wisner case. But see Yellow Aster Co. *v.* Crane (1907) 150 Fed. 580; and Baxter Co. *v.* Hammond Co. (1907) 154 Fed. 992.

[11]*In re* Hohorst (1893) 150 U. S. 653.

[12]Cucciarre *v.* N. Y. Cent. R. R. Co. (1908) 163 Fed. 38.

only.[13] The exception in the case of an alien defendant arose from necessity, and there is no support for extending it to cases where a citizen is the defendant and the necessity for the exception is absent. When a resident plaintiff sues an alien and the latter petitions for removal the plaintiff's consent is obviously unnecessary. But if the plaintiff be a non-resident citizen his consent is essential to the Federal court's maintenance of the suit on removal, as he was not amenable originally to a court of a district other than his own. Again, where the plaintiff is an alien his consent to a petition for removal is theoretically unnecessary, as he was originally suable in any district. This objection is invalid, however, if the alien plaintiff has acquired a residence.[14] By regarding the petition for removal as process,[15] it might be held that the Circuit Court thus gets jurisdiction of the alien plaintiff, who, for the purposes of the removal, is virtually a defendant.[16] This, however, would still necessitate the consent of a non-resident citizen plaintiff, for the service of original process on him, in any but his own or defendant's district would, without his consent, be insufficient to give the Circuit Court jurisdiction.

In a recent case, *Mahopoulus* v. *Chicago R. R. Co.* (1909) 167 Fed. 165, in which a non-resident alien sued a corporation in a state other than that of defendant's incorporation, the cause was held not removable without the plaintiff's consent, the court making no distinction between the case in which the plaintiff is a non-resident alien and that in which he is a non-resident citizen.[17] Practical considerations may be cited in support of this view. The object of removals in cases involving citizenship or alienage is to avoid the possibility of prejudice in a trial by a state court. Thus, a resident defendant may never remove,[18] but a non-resident always has the right where the suit is brought in the plaintiff's state.[19] Consequently, there is no necessity for a removal from the courts of a neutral state. Further, to hold an alien plaintiff's consent necessary subserves the general purpose of the Removal Acts, which was to contract the jurisdiction of the Federal courts, both original and on removal.[20]

THE DEVISABILITY OF CONTINGENT REMAINDERS AND EXECUTORY DEVISES AT COMMON LAW.—The common law test of devisability of estates and interests in real property is difficult of determination. By the terms of the Statutes of Wills seisin in the devisor was apparently intended to be the test.[1] The Statutes provide that all persons "having manors," etc., and, as amended, "having a sole estate, or interest in fee simple * * * in pos-

[13]Galveston R. R. Co. *v.* Gonzales (1893) 151 U. S. 496; Campbell *v.* Duluth Co. (1892) 50 Fed. 241.

[14]Walker *v.* O'Neil (1889) 38 Fed. 374.

[15]Kinney *v.* Savings Bank Ass'n. (1903) 191 U. S. 78.

[16]La Montagne *v.* Lumber Co. (1891) 44 Fed. 645.

[17]Morris *v.* Clark Construction Co. (1905) 140 Fed. 756; but see Barlow *v.* Chicago R. R. Co. (1908) 164 Fed. 765, *contra.*

[18]Western Union Tel. Co. *v.* Brown (1887) 32 Fed. 337.

[19]Gavin *v.* Vance (1887) 33 Fed. 84; Fales *v.* Chicago R. R. Co. (1887) 32 Fed. 673; Cooley *v.* McArthur (1888) 35 Fed. 372.

[20]Shaw *v.* Quincy Mining Co. (1892) 145 U. S. 444; Jackson Co. *v.* Pearson (1892) 60 Fed. 113, 127.

[1]The view that the devisor needed both right to and possession of the land devised doubtless applied only to devises of estates in possession, and affords no general rule. Shep. Touch. 428, § 13.